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No. 89-333

In the Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF CALIFORNIA, PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE MODESTO IRRIGATION DISTRICT AND TURLOCK IRRIGATION DISTRICT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT, THE FEDERAL ENERGY REGULATORY COMMISSION

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30 pp

QUESTION PRESENTED

Should this Court overrule *First Iowa Hydro-Electric Coop. v. Federal Power Comm'n*, 328 U.S. 152 (1946), and nearly 45 years of Supreme Court precedents and administrative practice so that the State of California can assume control over hydroelectric power projects already constructed or planned for construction?

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INTEREST OF *AMICI CURIAE*

This Brief is filed pursuant to Supreme Court Rule 37 by the Modesto Irrigation District and Turlock Irrigation District ("the Districts") as *amici curiae* in support of Respondent, the Federal Energy Regulatory Commission ("FERC"). The Districts are California irrigation districts organized and operated under the California Water Code, and are agencies of the State of California exercising governmental functions, *see* Cal. Water Code § 20570. This brief is sponsored by the chief legal representative of each irrigation district. Consequently, no consents to the filing of this brief are required under this Court's Rule 37.5.[1] These Districts *oppose* the position advocated by the State of California in this case, as ill-advised, unworkable, and contrary to Congress' intent and longstanding legal precedent.

[1]Nevertheless, the Districts do have the consent of the parties to file this brief.

The Districts hold an FERC license for the construction and operation of a 165 megawatt hydroelectric plant on the Tuolumne River in California, which became operational in 1971 and was built at an original cost of about $92.5 million. By amendment to the license, the FERC recently authorized the addition of a fourth generating unit at the plant and approved amendments to provide for additional fish studies agreed upon by the Districts and the California Department of Fish and Game and the U.S. Fish and Wildlife Service. Article 37 of the license sets forth the minimum flow release schedule for the protection and maintenance of fish below the dam under normal, dry, and critically dry runoff conditions. The normal water year schedule was modified by agreement of the Districts and the California Department of Fish and Game as authorized by Article 37 and the modified schedule was approved by the FERC in the above license amendment. The FERC retains authority to make further changes as may be required, upon notice and an opportunity for hearing.

From 1971 until 1985, the Districts operated their jointly owned project, called the "New Don Pedro Project" (hereinafter "New Don Pedro") in harmony with the state agency responsible for administering state water rights, the State Water Resources Control Board ("State Board"), represented by the Petitioner. Since 1985, the State Board has taken the position that it has the power to impose fish water release requirements different from and more burdensome than the FERC requirements, and the right—on an after-the-fact basis—in effect to attach conditions to the outstanding FERC license for New Don Pedro. The State Board's justification for this position has been the public trust doctrine, which as interpreted by Petitioner purports to allow reallocation of water from vested rights to so-called public uses. As *amici curiae* in this proceeding, the Districts oppose any change in the supremacy of FERC hydroelectric power licenses and support the Ninth Circuit's determination that the holders of such licenses, once issued, are free from interference by state agencies in areas covered by the FERC license.

SUMMARY OF ARGUMENT

In the court below, the State of California boldly sought to usurp through "state preemption" the congressionally mandated powers of the FERC and take over the management of new and existing hydroelectric projects on the navigable rivers of California. The Ninth Circuit rejected California's position based on this Court's ruling in *First Iowa Hydro-Electric Coop. v. Federal Power Comm'n*, 328 U.S. 152 (1946), which held that Congress intended the Federal Power Commission (now FERC) to have exclusive licensing and supervisory authority over hydroelectric plants on navigable waterways. In *First Iowa*, this Court examined the text of the statute, its structure, purpose and legislative history, and rejected the claim of the State of Iowa that a state veto and dual sovereignty were intended by Congress.

California contends that the time has come for this Court to overrule *First Iowa*. Yet it cites no persuasive reason for this Court to do so. The Court has consistently adhered to the view it expressed in *First Iowa*. In its Ninth Circuit briefs, the State purported to find "new" legislative history that justified its view, but as the Ninth Circuit recognized, 877 F.2d at 749-50; Pet. App. A-12 to A-13, the very extracts from the congressional debates the State cited were considered by this Court in 1946 and found not persuasive.

The State claims that *California v. United States*, 438 U.S. 645 (1978), justifies departure from *First Iowa*, neglecting to concede that this Reclamation Act case is now 12 years old and that *First Iowa* has been thereafter repeatedly cited as authoritative by this Court. *California v. United States* restored to Section 8 of the Reclamation Act the meaning found in it from 1902 to 1958; the State would use that case to deprive the Federal Power Act of the settled meaning it has enjoyed since 1946.

The dual sovereignty that the State seeks in this case is unworkable. For example, the FERC established a June bypass flow of 11 cubic feet per second ("cfs") for the Rock Creek project,

thereby simultaneously allocating the remaining flow for hydropower generation. The State Board later decreed a June bypass flow rate of 60 cfs. If the FERC mandated minimum bypass flow is 11 cfs, it cannot also be 60 cfs because the 60 cfs bypass flow results in a different allocation of water between the two competing uses. One agency must decide how much water shall be released for the protection of fish below a hydroelectric project. California says it should decide; the statute, this Court's precedents and nearly 45 years of history say it should not—the FERC should decide. This Court should reject California's arguments and affirm the Ninth Circuit decision because there is no reason for the Court to reopen the issues settled long ago in *First Iowa*.

ARGUMENT

I.

INTRODUCTION

This Court is not writing on a clean slate. In 1946 the Court carefully reviewed the great debate leading to the Federal Power Act of 1920 ("FPA")[2] and confirmed that Congress intended for the Federal Power Commission to exercise the full measure of federal authority in administering power development of the nation's rivers. *See First Iowa Hydro-Electric Coop. v. Federal Power Comm'n*, 328 U.S. 152 (1946). The Court concluded that Congress intended for states to exercise only an advisory role in recommending to the FPC how to manage power developments within their borders. *First Iowa* controls the instant case and should not be overruled.

Nevertheless, California argues its position here as though the Court faces an issue of first impression. For example, California analyzes the legislative history of the Federal Power Act's adoption in 1920, failing to note that this Court exhaustively analyzed the same legislative history nearly forty-five years ago in 1946, when deciding *First Iowa*. California exhorts this Court with policy arguments for how best to administer the nation's hydroelectric projects and power networks. *See, e.g.*, Petitioner's Opening

[2]41 Stat. 1063 (1920).

Brief, at 18-22, 45-47. Yet, despite California's invitation, this Court is not a super-agency mediating disputes about water uses at federal power projects and attempting to create by judicial decree the best or most efficient structure for managing all the various FERC-licensed power projects. Congress has already done this and the agency it vested with such authority is the FERC and not the State of California. This Court has already exercised its role in *First Iowa*, which is merely to construe the Federal Power Act, which Congress adopted in 1920. This Court then concluded that the Federal Power Commission, not the states, has authority to regulate stream flows at FPC-licensed projects. Many hydroelectric projects have been constructed in reliance on the Court's ruling in *First Iowa*.[3]

This case does not involve a dispute concerning the extent of a state's authority to allocate consumptive use of surface waters within its boundaries. This is not a water rights case. Instead, this case presents the question of whether Congress may vest authority in a federal agency to regulate integral features of federally licensed energy projects on the nation's rivers. The answer is that Congress may vest such authority in a federal agency, that it has done so in the Federal Power Act, and that conflicting state regulations must give way to such preemptive federal authority.

Stream flows are not simply an aesthetically pleasing, relatively flexible feature at FERC-licensed hydroelectric projects; stream flows and water storage are the soul of a project. Hydroelectric dams exist for the purpose of storing or diverting water to run through turbines and generate electricity at times when power is needed (as well as for irrigation and other consumptive uses). Water that is required for instream flows for fish is not available

[3]The massive power projects that Congress envisioned came to fruition and now dominate the major navigable rivers of the country. The diverse water works and power networks managed by the FERC transcend state boundaries, spanning entire river basins and requiring coordination at all levels of stream flows, water storage, and power generation. In reliance on the administrative structure that Congress protected from parochial control by the several states, hydropower project sponsors (and their bondholders) have invested billions of dollars to create and maintain the massive power system Congress envisioned.

for project storage, consumptive uses, or future power generation. When the FERC issues a license for a project, it carefully considers, with participation from the states, local governments, environmental groups and other interested parties, the multitude of factors that affect what level of instream flows should be required at the project.

To fulfill its congressional mandate to administer federal power projects within its jurisdiction, the FERC must have authority to determine project flows. This case concerns the meaning of the statute that gave the FERC plenary authority to regulate hydroelectric projects within its jurisdiction. This Court construed that statute nearly forty-five years ago in *First Iowa* and concluded that states may not veto the FERC's determination of project flows. Congress has not acted since then to vest such veto authority in the states.[4] This Court should decline California's invitation to rewrite the Federal Power Act to suit the state's agenda.

II.

FIRST IOWA HAS BEEN UNIFORMLY FOLLOWED BY THIS COURT AND SHOULD NOT BE OVERRULED

A. This Court Has Repeatedly Reaffirmed *First Iowa*.

This Court has uniformly adhered to *First Iowa*'s holding that the Federal Power Act of 1920 preempted all state regulation of hydroelectric power projects licensed by the FERC. As recently

[4]Nothing has happened in the forty-four years since this Court's ruling in *First Iowa* to modify this Court's perspective on what Congress intended when it adopted the Federal Power Act in 1920. This Court had available then the same indicia of original legislative intent it has now. Moreover, Congress, through its decision not to tamper with the balance of federal authority struck in the FPA, has ratified and concurred in this Court's frequently reiterated conclusion that Congress intended for the FPC to exercise comprehensive federal authority. On questions of statutory interpretation, this Court defers to Congress to amend a statute to meet perceived changes in the nation's needs. *See Patterson v. McLean Credit Union*, 491 U.S. ___, 109 S.Ct. 2363, 2370 (Kennedy, J.) & 2385 (Brennan, J., concurring) (1989) (special justification required for departure from *stare decisis* on matters of statutory interpretation).

as 1982, in *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338, n.6 (1982), the Court unanimously noted that, regardless of the extent of a state's proprietary interest in a river that is the source of power for a FERC-licensed hydroelectric project, "the pre-eminent authority to regulate the flow of navigable waters resides with the Federal Government." Citing *First Iowa*, the Court noted that the state's purported " 'ownership' " of the river "provides no justification for restricting or conditioning the use of these federally licensed units." *Id.*

Similarly, in 1983, the Court summarized the *First Iowa* holding with respect to the preemptive purpose and sweep of the Federal Power Act in order to distinguish it from the Atomic Energy Act which did not give the NRC comprehensive planning responsibility. *See Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 223, n.34 (1983). The Court stated:

> In *First Iowa*, this Court held that compliance with requirements for a state permit under Iowa law was not necessary in order to secure a federal license for a hydroelectric project. Allowing the States to veto federal decisions could 'destroy the effectiveness of the Federal Act. It would subordinate to the control of the State the "comprehensive" planning which the Act provides shall depend upon the judgment of [the Federal Government].' Id., at 164. In the same manner, requiring compliance with state requirements would have reduced the project to a size that the Federal Power Commission had determined was inadequate, and compliance with state engineering requirements could handicap the financial success of the project.

Id. In addition, in *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 773 (1984), the Court discussed Congress' purpose in passing the Federal Power Act and noted, citing *First Iowa*, that Congress intended to vest in the Commission exclusive authority to issue licenses for hydroelectric projects in "order to eliminate the inefficiency and confusion caused by the 'piecemeal, restrictive, negative approach' to licensing prevailing under prior law." Thus, very recent Court deci-

sions have reaffirmed *First Iowa*'s holding with undiminished force. Contrary to the claims of California this Court clearly does not regard *First Iowa* as being undermined by recent preemption and reclamation cases.

B. This Court Has Repeatedly Found That The Federal Power Act Vests Comprehensive Regulatory Authority In The FERC.

Since *First Iowa* the Court has revisited on several occasions the question of Congress' purpose in passing the FPA. Repeatedly, the Court has emphasized Congress' intent to preempt the field with federal regulation of hydroelectric projects. For example, in *FPC v. Union Electric Co.*, 381 U.S. 90, 97-98 (1965), the Court explained that Congress intended to exercise "comprehensive control over those uses of the Nation's water resources in which the Federal Government had a legitimate interest; these uses included navigation, irrigation, flood control, and, very prominently hydroelectric power—uses which, while unregulated, might well be contradictory rather than harmonious." Quoting *First Iowa*, the Court observed that the 1920 Act " 'was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so . . . .' " *Id.* at 99. In studying the legislative history, the Court found that "conservationists and opponents seemed to agree that the Act embodied the full measure of Congress' authority under the Commerce Clause to regulate hydroelectric projects." *Id.* at 107.

The Court has observed how a state's licensing requirements can interfere with a comprehensive scheme of federal regulation. Citing *First Iowa*, the Court explained that: "A State may not enforce licensing requirements which, though valid in the absence of federal regulation, give 'the State's licensing board a virtual power of review over the federal determination' that a person or agency is qualified and entitled to perform certain functions, or

which impose upon the performance of activity sanctioned by federal license additional conditions not contemplated by Congress." *Sperry v. Florida*, 373 U.S. 379, 385 & n.4 (1963). Similarly, the Court has declared: "It is no longer open to question that the Federal Government under the Commerce Clause of the Constitution . . . has dominion, to the exclusion of the States, over navigable waters of the United States [citing, among other cases, *First Iowa*] . . . Congress has elected to exercise this power under the detailed and comprehensive plan for development of the Nation's water resources, which it prescribed in the Federal Power Act, to be administered by the Federal Power Commission. [citing *First Iowa*]" *Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 334 (1958). In addition, in *Federal Power Comm. v. Oregon*, 349 U.S. 435 (1955), the Court, interpreting § 27 of the Federal Water Power Act and reaffirming *First Iowa*, explained:

> There thus remains no question as to the constitutional and statutory authority of the Federal Power Commission to grant a valid license for a power project on reserved lands of the United States, provided that, as required by the Act, the use of the water does not conflict with vested rights of others [quoting Section 27 in a footnote]. To allow Oregon to veto such use, by requiring the State's additional permission, would result in the very duplication of regulatory control precluded by the First Iowa decision. . . . No such duplication of authority is called for by the Act. [Quoting in a footnote the portions of the *First Iowa* decision discussing the threat of a state veto to comprehensive planning by the FPC.]

Id. at 444-45 and nn.15, 16.

C. *First Iowa* Controls Resolution Of This Case.

The Court's clear language in *First Iowa* and subsequent cases leaves no room for the strained distinctions that the State of California tries to draw here to distinguish *First Iowa*. California is asking this Court to overrule *First Iowa* and nearly 45 years of consistent precedents so California can seize control of FERC-authorized hydroelectric projects and dictate the terms under which they will continue to operate.

California advances two arguments to persuade this Court to depart from the unbroken line of authority following *First Iowa*: (1) that *First Iowa* was not concerned with water rights; and (2) that the language directed to Section 27 of the FPA was dictum, unnecessary to the decision. Petitioner's Opening Brief, at 36-38 & n.18. Both points are simply wrong.

According to what the State of Iowa told this Court at the time *First Iowa* was decided, the purpose of the state law at issue in that case was "to conserve and protect as far as possible all public and riparian rights in the waters of the state . . . Surely, no one can contend that this language [of the Iowa statute] does not refer to the appropriation, diversion and use of water for power purposes." *See* Petition for Rehearing by State of Iowa, at 13 (1946) (filed in *First Iowa*).[5] The Iowa law was, in fact, a codification of the common-law riparian water rights rule forbidding trans-basin diversions. Thus, contrary to California's suggestion, the issue in *First Iowa* was the same as that here—the extent to which state laws concerning water rights are preempted by the FPA. *First Iowa* involved more than a state use permit; it involved state-created water rights overridden by the FPA.

Similarly, California's argument that *First Iowa* did not turn on a construction of Section 27 of FPA is also wrong. The Court's analysis of Section 27 in *First Iowa* was an integral part of the conclusions it reached. *See* 328 U.S. at 175-77. California would distinguish between a project operator's acquiring a permit prior to obtaining an FERC license as opposed to a project operator's acquiring a state water right prior to diverting water under an FERC license. But that distinction makes no sense in light of the Court's overriding concern in *First Iowa*. The Court repeatedly emphasized that Congress intended to promote hydropower development through federal licensing and there is no room for

[5]Copies of relevant briefs filed with this Court in the *First Iowa* case were appended to Intervenor, Rock Creek Limited Partnership's brief that was filed with the Ninth Circuit; presumably these *First Iowa* briefs are also readily available in this Court's archives. Therefore, they are not separately appended to this *amici* brief.

state control of matters within the federal plan of regulation. Clearly the diversion of water by a FERC-licensed project is an integral part of the generation of hydroelectric power. If a state imposes conditions on such diversion that conflict with conditions imposed by the FERC—such as the minimum fish flow requirements at issue here—it is interfering with the comprehensive scheme Congress established. *First Iowa* cannot be neatly distinguished on the technical grounds suggested by the State of California and this Court should not now overrule its longstanding precedent in *First Iowa*.

III.

THE STATE'S ARGUMENTS ABOUT THE LEGISLATIVE HISTORY OF THE FEDERAL POWER ACT OF 1920 ARE NEITHER NEW NOR PERSUASIVE; THIS COURT IN *FIRST IOWA* ADDRESSED AND REJECTED THEM

Much of the State's brief is taken up with a detailed review of selected portions of the legislative history of the FPA. The state presents its arguments concerning the legislative history with great fanfare, implying that it has unearthed previously unnoticed but controlling authority that mandates overruling *First Iowa*. According to the State, "The legislative history of the FPA provide[s] the strongest indication that Congress intended to defer to state water rights laws." Petitioner's Opening Brief, at 22.

Unfortunately for the State, its strongest argument is simply a belated reprise of the same legislative history arguments this Court rejected nearly forty-five years ago in *First Iowa*. A few examples illustrate this point and show why this Court should not reexamine the informed interpretation of the legislative history that it reached in 1946 in *First Iowa* and has reaffirmed on numerous occasions since then.

The State of California relies heavily on certain statements by Congressman LaFollette concerning S. 1419 (1918). Petitioner's Opening Brief, at 31-32 & n.15. California's brief neglects to note that in *First Iowa* this Court was aware of, considered, and re-

jected the State's interpretation of Mr. LaFollette's statements. *See First Iowa*, 328 U.S. at 173-74; *see also* Brief For State of Iowa, at 28 (1946) (filed in *First Iowa*); Brief For The Federal Power Commission, at 19 (1946) (filed in *First Iowa*); Brief For First Iowa-Hydro-Electric Cooperative, at 32-33 (1946) (filed in *First Iowa*); Petition For Rehearing By State of Iowa, at 17-19 (1946) (filed in *First Iowa*; the petition for rehearing was denied, 328 U.S. 879 (1946)).[6] The court of appeals in *First Iowa* had also relied on Mr. LaFollette's comments, *see* 151 F.2d 20, 25 n.17 & 28 n.36 (D.C. Cir. 1945). Obviously, when this Court decided *First Iowa* it was not persuaded by California's interpretation of Congressman Mr. LaFollette's statements. The Court heard numerous characterizations of Mr. LaFollette's statements and chose one interpretation of them. Those statements have not changed their meaning with the passage of forty-five years.

The State's brief also relies extensively on comments of Congressman Mondell made in a colloquy with Congressman Raker. *See* Petitioner's Opening Brief, at 33, n.15. Mondell's comments were discussed, quoted and referenced in excruciating detail in the briefs presented to this Court in *First Iowa*. *See* FPC's Brief, at 20 (filed in *First Iowa*); First Iowa Hydro-Electric's Brief, at 34-35 & Appendix pp. 40-42 (filed in *First Iowa*); Iowa Rehearing Petition, at 18-19 (filed in *First Iowa*).

This Court also was made well aware of the sequence and language of bills leading up to the final language of the FPA, to which the State of California imputes great significance here in its attempt to have *First Iowa* overruled. *See First Iowa*, 328 U.S. at 176 n.20; Petitioner's Opening Brief, at 23-35. The First Iowa Hydro-Electric Cooperative included a detailed chronology of the legislative history of the Federal Power Act which makes specific reference to many of the points raised here in the State of California's brief concerning H.R. 16673 (1914), H.R. 408 (1916), S. 1419 (1918), and H.R. 3184 (1920). *See* First Iowa-Hydro-Electric's Brief, at Appendix pp. 37-45 (filed in *First Iowa*). This detailed summary of the legislative history was presented to the court of appeals in *First Iowa* by the Federal Power Commission.

[6]*See supra* note 5.

See id. For example, Congressman Mondell's statements concerning section 14 of H.R. 16673 (1914), which according to the State of California prove that rights to use water at federal power projects must be acquired from the states under the FPA, *see* Petitioner's Opening Brief, at 23-24, was quoted in entirety to both the court of appeals and this Court in *First Iowa*. *See* First Iowa Hydro-Electric's Brief, at Appendix pp. 44-45 (filed in *First Iowa*). Obviously, this Court in *First Iowa* did not find Congressman Mondell's states-rights interpretation of the savings language in section 9 and section 27 of the FPA (as carried forward from section 14 of H.R. 16673) to be controlling. This Court is not in any better position now to reassess its conclusion in *First Iowa* on this aspect of the FPA's legislative history.

This cursory examination of the materials and arguments presented to the Court in *First Iowa* reveals that the Court had full notice of all of the legislative history arguments about the FPA raised in this case by the State of California as well as the many persuasive arguments to the contrary. *See* Iowa's Brief, at 23-28, 36 (filed in *First Iowa*); FPC's Brief, at 19-20, 40, 47-53 (filed in *First Iowa*); First Iowa Hydro-Electric's Brief, at 22-23, 32-35, Appendix pp. 37-45 (filed in *First Iowa*); Iowa's Petition For Rehearing, at 17-19, 24 (filed in *First Iowa*); *see also First Iowa Hydro-Electric Cooperative v. FPC*, 151 F.2d 20, 25 n.17, 27-28 n.36 (D.C. Cir. 1945), *rev'd*, 328 U.S. 152 (1946). The parties to *First Iowa* recited chapter and verse to the Court for the major points now raised by the State of California. Consequently, it is extremely disingenuous for the State of California to argue here that the legislative history of the FPA conclusively demonstrates that Congress intended to permit states to dictate minimum flows at FERC-licensed facilities. As the Ninth Circuit recognized below, California's revisionist interpretation of the selfsame evidence of legislative history was thoroughly considered and rejected by this Court in *First Iowa*. *See* 877 F.2d at 749-50; Pet. App. A-12 to A-13.

Here, the statutory scheme that Congress established is clear. It is difficult to believe that Congress intended for 48 states, as we then were, to have dual control over hydroelectric projects on

navigable waters of the United States. Ample provision was made for the states and their responsible agencies (fish and game, state engineer) to appear and be heard in FPC licensing proceedings. But the thrust of the statute was that the Commission would decide on the value of each project and how it would be constructed and operated. To allow the Commission's orders to be set aside by a state agency is a result so at war with the statutory scheme as to deny the text of the Act. The statute does not reflect the ambiguity attributed to it by Petitioner.

IV.

CALIFORNIA V. UNITED STATES, CONSTRUING THE RECLAMATION LAW, OFFERS NO GUIDANCE FOR THE DECISION OF THIS CASE

California's arguments here boil down to one issue: should this Court overrule *First Iowa* and nearly 45 years of Supreme Court precedents and administrative practice so that the State of California can assume control over hydroelectric power projects already constructed or planned for construction? In asking this Court to overrule its decision in *First Iowa*, California ignores the vast differences between Congress' 1902 program for reclamation of arid lands and its 1920 program for federal administration of hydroelectric projects.

The State of California places great reliance on the Court's decision in *California v. United States*, 438 U.S. 645 (1978) (the *New Melones* case), which required the Secretary of the Interior to conform to state law in administering irrigation projects under the 1902 Reclamation Act. But the *New Melones* case is not a proper guide for the decision of this case. It was governed by the Reclamation Act of 1902; this case is governed by the Federal Power Act of 1920. The historical forces that produced the two acts and the problems they were designed to solve were quite different.

California's revisionist interpretation of history carefully avoids facing the differences between Congress' reclamation program in 1902 and its program to regulate and promote development of federal power in 1920. *See* Petitioner's Opening Brief, at 17 ("the similarities of the programs are stronger than their differences . . ."). California knows that this is the fundamental weakness in its argument. For California it is enough to say that the statutory language is similar, that both statutes created federal agencies, and that both programs provide for development of water for economic purposes. *Id.* California may be persuaded by such superficial analysis;[7] yet this Court was not and should not be. The Court cannot reverse the course of nearly 45 years of history of federal power development and regulation without probing deeper into the differences between federal power programs and the reclamation programs that California holds out as an example. Too much is at stake here for that.

The Court's decision in the *New Melones* case was influenced in large part by the history and purposes of the reclamation laws, which the Court viewed as rooted in and interwoven with state law. As the Court noted, the reclamation laws reflect a sort of "cooperative federalism"; in the Reclamation Act of 1902, Congress "merely authorized the expenditure of funds in States whose citizens were generally anxious to have them expended." 438 U.S. at 650-51. Congress' goal was to help state and local governments in the western states finance projects to store their water.

The Reclamation Act was originally intended to conquer the desert by bringing irrigated agriculture to arid western lands. It created a public works program in which the federal government supplied the otherwise absent capital for irrigation development.[8] The Bureau of Reclamation built and operated the projects within

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[7]Nevertheless, California's representatives clearly know that the reclamation program was a public works program meant to promote state and local irrigation projects while the federal power program was not. *See, e.g.*, R. Walston, *Storm in the Desert: The Great Western Water Wars*, 26 *Journal of the West* 78 (July 1987) (discussing in detail the history behind and reasons for federal reclamation projects).

[8]*See generally* A. Golze, *Reclamation in the United States* 19-34 (1961) (cited in *California v. United States*, 438 U.S. 645, 649 nn.1-3 (1978)); 2 R. Clark, *Waters and Water Rights*, §§ 110.1, 110.2, at 120-21 (1967).

the framework of a state legal system that provided the water rights and authorized the organization of water districts that obligated themselves to pay construction, operating and maintenance costs.[9] In the absence of state law, there was no project.

The Federal Power Act stands in stark contrast to the Reclamation Act. The FPA is a regulatory statute, in the tradition of the Interstate Commerce Act of 1887, 24 Stat. 379 (1887) (which established the Interstate Commerce Commission) and the Federal Trade Commission Act of 1914, 38 Stat. 717 (1914) (which established the Federal Trade Commission) and was a forerunner of the regulatory agencies of the 1930s. The purposes of the FPA were three-fold: (1) to promote hydroelectric power on federal lands and on navigable waterways controlled by the federal government; (2) to give preference to public entities such as municipalities in the use of the power; and (3) to capture for the government some of the economic rents of water power, first by charges to licensees and second by recapture provisions upon expiration of licenses. This pervasive regulatory scheme could and did provide protection in Section 27 for vested water rights established under state law. It had no room for supervening regulation of the projects by state administrative agencies.[10]

The State of California would like to persuade this Court, with "revisionary zeal," *see California v. United States*, 438 U.S. 645, 693 (1978) (White, J., dissenting), to change the law, as it pur-

[9]The Turlock Irrigation District and Modesto Irrigation District do not receive any Bureau of Reclamation water.

[10]*See generally* 4 R. Clark, *Waters and Water Rights* § 330, at 293-94 (1970). Theodore Roosevelt recommended in 1908 that "although works for improvement of navigation, power development, irrigation, flood control, and water supply for domestic and manufacturing purposes should continue, the time had come to merge local projects and uses of inland waters in a comprehensive plan designed to benefit the Nation as a whole." *Id.* at 293 (citing 42 Cong. Rec. 6988 (1908)). Private and public power interests continued to fight over how to develop a comprehensive plan for the development of the nation's waterways. *Id.* at 294. The conservationists prevailed, establishing in the FPA a national policy on the "use and development of water power on public lands and navigable streams." *Id.*

portedly did in the *New Melones* case. But the State's premise is wrong. *New Melones* did not change the law; it restored to Section 8 the meaning it had from 1902 to 1958 and repudiated the apparent departures from that meaning appearing in dicta in the late 1950s. Until then federal-state relations under the Reclamation Act followed a familiar, well-worn path for more than 50 years from the Act's adoption in 1902—a path marked by milestones such as *Nebraska v. Wyoming* and *Gerlach*, in which the Court routinely rejected claims of federal supremacy and reaffirmed deference to state law mandated by Section 8 of the Reclamation Act.[11]

Only when patently insupportable claims under state law were advanced did this Court—unnecessarily—depart from deference to state law under Section 8. Thus in *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 288 (1958), the petitioner, in a brazen attempt to evade acreage restrictions imposed by the 1902 Act, asserted that state law forbade such restrictions. Unfortunately, instead of giving the simple answer that Section 5 of the 1902 Act set forth a specific congressional directive that was intended to override any contrary provision of state law, the Court undercut Section 8 and its deference principle. 357 U.S. at 290, 295-97. The achievement of the *New Melones* case was to point out the unnecessary deviation from prior decisions represented by *Ivanhoe* and to restore the principle of deference embodied in Section 8.

[11]*See United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950); *Nebraska v. Wyoming*, 325 U.S. 589 (1945). In *Nebraska v. Wyoming*, Nebraska challenged diversions by Wyoming and Colorado of irrigation water from the North Platte River and sought an equitable apportionment of the waters from that river. 325 U.S. at 591-92. The Court confirmed that Section 8 of the Reclamation Act of 1902 required the federal government, as a "carrier and distributor" of reclamation project water, to conform with state law concerning the appropriation and use of such water. 325 U.S. at 614-15.

In *United States v. Gerlach Live Stock Co.*, the United States challenged private parties' claims for compensation arising from loss of riparian rights caused by construction of the Central Valley Project in California. 339 U.S. at 727-28. The Court concluded that when Congress instructed that the reclamation law would govern construction of this project, Congress intended the Secretary of Interior to proceed in compliance with state laws concerning appropriation and use of such water. 339 U.S. at 734-36, 739-42.

The FPA has no comparable legal history. From the time this Court first spoke in 1946, in *First Iowa*, the Act has been characterized as a pervasive licensing and regulatory system administered exclusively by a federal agency. There is no occasion for this Court to re-examine the FPA because, unlike Section 8, its interpretation has been uniform and unbending in respect to the necessity of federal supremacy. The Reclamation Act did not preempt state law; with reclamation projects Congress directed the Bureau of Reclamation to proceed in conformity with state law. In stark contrast, the Federal Power Act was the product of a heated and bitter debate in which the need for power was balanced against the need for conservation by placing all projects governed by the act under the exclusive regulatory control of the Federal Power Commission. The role of conflicting state regulation was specifically addressed in the debate in Congress over the FPA and Congress deliberately chose to preempt such conflicting state rules by dividing control by subject matter and giving each entity final authority within its jurisdiction. *See First Iowa*, 328 U.S. at 167-68. Congress decided to protect against the risk that states would veto projects that satisfied federal requirements. *See id.* at 164. Thus, the FPA is not an example of legislation where Congress' preemptive intent was unclear; Congress clearly chose for federal authority to preempt overlapping or conflicting state regulation.[12] The states and their agencies have ample opportunity to voice their concerns through appearances before the Com-

[12]The evidence of preemption is clear in this case. The Court in *First Iowa* reviewed the language and legislative history of the Federal Power Act and concluded that Congress intended "to secure a comprehensive development of national resources and not merely to prevent obstructions to navigation . . ." 328 U.S. at 181. The Court thereby distinguished the FPA from the Rivers and Harbors legislation cited by the State for the proposition that federal and state authorities have dual authority over matters in navigable waters. *See* Petitioner's Opening Brief, at 40, 48. The Court concluded that, "The detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls." *First Iowa*, 328 U.S. at 181. There is no question that regulation of project releases—the point of dispute in the instant case—is an integral part of the FERC's regulatory task under the FPA. Therefore, it is clear that California's conflicting proposals must give way under established preemption doctrine.

mission, and through their continuing authority over the proprietary matters as discussed by the Court in *First Iowa*.

The State's position in this case comes down to a naked assault on established, heretofore unchallenged law. *New Melones* offers no comfort, for it *restored* the Reclamation Act's historical meaning by reaffirming the first 50 years of interpretation of that Act by this Court. Yet the State would use *New Melones* to overturn nearly 45 years of settled interpretation and administration of the FPA under this Court's rulings. In short, the State would expand *New Melones* beyond recognition in order to gain control over hydroelectric projects—a control that Congress never intended the states to have and that no court has ever validated.

V.

THE STATE'S ARGUMENTS ABOUT ADMINISTRATIVE INTERPRETATION ARE NOT RELEVANT HERE

The State of California and the *amici* States have made passing reference to the alleged contemporaneous administrative interpretation of the FPA prior to this Court's definitive ruling in *First Iowa* in 1946. *See* Petitioner's Opening Brief, at 35, n.17; Brief of Amici States, at 20-24. An administrative interpretation that may have been followed more than 45 years ago—and not followed at any time since—is not relevant to this Court's interpretation of the legal issues raised by the FPA. If principles of deference to administrative interpretation are to guide the legal interpretations made on this appeal, *see, e.g., Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), it is the current interpretation, advanced here by the FERC and followed and relied on by private parties for nearly 45 years, that is relevant.

Even so, California and the *amici* States' summary of the Federal Power Commission's interpretation of the FPA prior to 1946 is inaccurate. The most reliable summary of the FPC's position appears in its brief to this Court in *First Iowa*. *See* FPC's Brief

(filed in *First Iowa*). The FPC's position then, although problematic now in light of the Court's resolution of matters in *First Iowa*, clearly does not lead to the position advocated here by the State of California.

The FPC went to great lengths in 1946 to distinguish the FPA from the earlier Rivers and Harbors legislation and call the Court's attention to the unique legislative history of the FPA. *See* FPC's Brief, at pp. 47-57 (filed in *First Iowa*). The FPC stressed that the Court should not ignore the "whole chapter of American history" by which conservationists, after extensive debates, secured "enactment of a complete scheme of national regulation which would affirmatively encourage and promote the comprehensive development and utilization of the water resources of the Nation, insofar as it was within the reach of the federal power to do so, instead of the piecemeal, restrictive, negative approach of the River and Harbor Acts and other federal laws previously enacted." *Id.* at p. 47. Congress, according to the FPC in 1946, sought to create "a complete scheme of regulation intended to secure and promote the comprehensive development of water resources subject to Federal control, in the public interest." *Id.* at p. 53. It is not insignificant that this Court appears to have borrowed and thereby endorsed this language from the FPC's Brief in presenting the Court's interpretation of the FPA in *First Iowa*. *See* 328 U.S. at 180-81.

Therefore, the State of California's arguments about the FPC's administrative interpretation from 1920 to 1946 are misplaced and should be rejected. The FPC's position even prior to 1946 does not lead to the dual control sought here by the State of California.

VI.

CALIFORNIA'S POSITION MAKES NO PRACTICAL SENSE AND DOES NOT NECESSARILY LEAD TO GREATER PROTECTION OF FISHERIES

California argues in this action that it has exclusive authority to regulate minimum project flows at an FERC-licensed hydro-

electric facility in order to impose more stringent requirements on the operator than the FERC has imposed. California implies in its Petition that such exclusive regulation of flows by the states is workable, does not infringe upon the FERC's prerogative, and will lead to greater protection of fish. Yet, in fact, California's proposed "state preemption" makes no practical sense, directly infringes on the regulatory prerogative that Congress intended the FERC to exercise, and merely transfers final decisionmaking authority from the FERC to the states without any assurance that states will be any more or less protective of fish than the FERC.

A. California's Interpretation Of The FPA Is Unworkable.

Both Congress and this Court recognized the practical problems that inhere in a system in which two separate decisionmaking entities have the right independently to set the parameters for operation of hydroelectric projects. California here is advocating precisely the veto power and overlapping jurisdiction that Congress sought to eliminate with the comprehensive program of federal regulation created in the Federal Power Act. The Court construed the FPA in *First Iowa* as preemptive of state laws that conflict or interfere with the FPC's regulatory authority at FPC-licensed projects precisely to prevent a state from exercising a veto: "Such a veto power easily could destroy the effectiveness of the federal act. It would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government." 328 U.S. at 164. The Court stated: "A dual final authority, with a duplicate system of state permits and federal licenses required for each project, would be unworkable. 'Compliance with the requirements' of such a duplicated system of licensing would be nearly as bad." *Id.* at 168.

California attempts to gloss over the unworkability of state regulation of FERC project flows by arguing here that it is not interested in obtaining veto power over FERC-licensed projects. *See, e.g.,* Petitioner's Opening Brief, at 48-49. The State argues

that it is not infringing on the FERC's prerogative when it sets more stringent conditions than the FERC, *id.* at 48-49, an argument that the Ninth Circuit rejected as, in effect, a veto of the project. 877 F.2d at 749; Pet. App. A-12. Veto, in the sense of "forbid," may not be the State's usual objective, but displacement of any other authority certainly is. When the FERC sets 100 cfs of water for fish, it is simultaneously assuring the availability of the remaining supply for other uses. When the State Board sets 175 cfs for fish, it is allocating 75 cfs less for other uses than the FERC ordered. The basic mistake of the State's thinking is revealed in the statement that the State has set more stringent conditions and hence there is no conflict between the State Board's order and the FERC's order. The test is not how stringent are the requirements for fish; rather, conflict occurs because of differences between the State Board and the FERC over amounts of water allocated for power. The State Board's more stringent requirement for fish is an invasion of the FERC's requirements for power. Each state agency has had the opportunity to fight out before the FERC the amount of water to be released for fish. The fight is a charade if, after losing, the state agency imposes its desires anyway.[13]

This Court clearly recognized in *First Iowa* the same ploy attempted here by the State of California: "Compliance with State requirements that are in conflict with federal requirements may well block the federal license." 328 U.S. at 167. Congress intended for the FERC to draw the line in setting conditions for operation of hydroelectric facilities, between environmental requirements and economic feasibility.[14] Yet the position the State of California is advocating here effectively makes all terms and conditions of FERC licenses superfluous because the State can specify its own construction conditions and operating conditions. Obviously, neither Congress nor this Court envisioned states playing such a role at FERC-licensed projects.

[13] *Amici* American Rivers, et al. contend that imposition of state-mandated minimum flows at FERC-licensed projects is analogous to Army Corps of Engineers participation in regulating water pollution at hydroelectric projects. Brief of Amici Curiae American Rivers et al. in Support of Petitioner, at 29-31. Such Army Corps participation is the result of Congress' "radical change in legislative policy" wrought in the Federal Water Pollution Control Act Amendments of 1972, *see* Monongahela Power Co. v. Marsh, 809 F.2d 41, 45 (D.C. Cir.), *cert. denied*, 484 U.S. 816 (1987), and sheds no additional light on Congress' intent in the entirely separate legislation at issue in this case—the FPA—which this Court definitively construed in *First Iowa*.

Unlike the FERC, the states are not charged with balancing the need for power against the need for promotion of fisheries. If the FERC is construed as having exclusive control over power, and the State has controlling jurisdiction to promote fisheries, no agency will ever balance these interests.

B. State Regulation Of Stream Flows At FERC-Licensed Projects Will Not Lead To Greater Protection And Enhancement Of Fish.

California also tries to make its extreme position palatable by implying that exclusive state authority over stream flows will lead to greater protection and enhancement of fish for recreational and commercial purposes. California suggests in its Brief that the purpose of its more stringent minimum flow requirements for the Rock Creek project is to protect trout, a recreational fish. Petitioner's Opening Brief, at 2-3. Nevertheless, the State's proposed interpretation of the FPA will not necessarily operate to advance greater protection and enhancement of fish either within or outside California.[15]

[14] Indeed, the FERC concluded in this case that the state's recommended minimum flows would jeopardize the economic feasibility of the Rock Creek project by causing "Rock Creek to suffer an extended span of substantial financial loss during the license term." Pet. App. A-20 to A-21.

[15] *Amici* American Rivers et al. advance a different, result-driven, argument that ignores the terms of the FPA and Congress' intent. They contend that the level of minimum project flows that most promotes fisheries, set either by a state or by the FERC, should apply to FERC projects. Brief of Amici Curiae American Rivers et al. in Support of Petitioner, at 8-9. The American Rivers position fails to balance the need for power with the need to promote fisheries; it would authorize a state to divert water to fish that the FERC would use for power. Such state authority could be used to render impracticable any FERC project, including importantly, all existing FERC-licensed facilities.

The State's interpretation of the FPA would simply shift decisionmaking prerogative from the FERC to the states; yet Congress specifically left the final decision with the FERC in enacting the Electric Consumer Protection Act of 1986, Pub.L. No. 99-495, 100 Stat. 1243, which amended portions of the FPA. Such a shift would not necessarily lead to enhanced fishery protection. The FERC is equally obligated by a host of laws and regulations to protect fishery resources. Such concerns are an integral factor in its decision to regulate minimum flows for fish. The fact that the State is unhappy in this particular instance with the FERC's resolution of such issues is not sufficient reason to upset the entire system of federal regulation.

Thus, the State of California's interpretation of the FPA is cumbersome and unworkable because of the state veto problems recognized by Congress and this Court. In addition, the State's position will not necessarily advance and may well hinder the protection and enhancement of the nation's fishery resources. In short, the State's position is contrary to Congress' intent, reflects bad policy and should be rejected.

C. California Is Simply Seeking To Expand Its Power Under The Public Trust Doctrine.

The State makes no bones about the broad objectives it has in seeking to overturn *First Iowa* in this litigation. Its aims are not confined to low-head hydroelectric projects. The principal objective of the State is to oust the FERC from a meaningful role in the licensing and oversight of all hydroelectric power projects—proposed and existing—and to replace the federal agency with the State Board. Once this power play has been effectuated, the State Board will invoke the public trust as announced by the California Supreme Court in *National Audubon Society v. Superior Court*, 189 Cal. Rptr. 346, 33 Cal. 3d 419, 658 P.2d 709 (1983), *cert. denied*, 464 U.S. 977 (1983). Relying on the public trust, which arguably reaches every trickle of water in the state and perhaps the snowpack as well, the State Board means to rewrite FERC licenses to its own taste, without regard to bond obligations, federal recapture rights, or FERC orders designed to implement a comprehensive plan for the development of federal waterways.[16] This is not even a "dual" system of control—water cannot be released at 100 cfs and at 175 cfs at the same time. A single authority must decide how much water goes to fish, how much to power and other uses. The State of California claims that authority in this case, but Congress and this Court lodged the power in the FERC, where it should remain.

VII.

CONCLUSION

The Ninth Circuit's decision below should be affirmed and the relief sought by California in this case should be denied.

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Respectfully submitted,

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[16]The *amici* States candidly admit their desire to rewrite FERC licenses to suit their tastes. For example, the State of Idaho would like retroactively to subordinate all hydropower water use in favor of "future upstream uses." Brief of Amici States in Support of Petitioner, at 26-27.